BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT CARPENTER Claimant VS. **NATIONAL FILTER SERVICE** Respondent AND **TRAVELERS INSURANCE CO. &/OR ROYAL INSURANCE CO.** Insurance Carrier AND/OR **WORKERS COMPENSATION FUND**	)	Docket No. 227,852

ORDER

Respondent and Royal Insurance Co. appealed Administrative Law Judge John D. Clark's Award dated June 14, 2001. The Board heard oral argument on December 14, 2001, in Wichita, Kansas.

APPEARANCES

Claimant appeared by his attorney, Brian D. Pistotnik of Wichita, Kansas. Respondent appeared by its attorney, Kendall Cunningham of Wichita, Kansas. Travelers and Royal Insurance Companies appeared by their attorney, William Townsley of Wichita, Kansas. The Workers Compensation Fund appeared by its attorney, Susan Ellis of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The respondent's insurance carrier, Royal Insurance Company (Royal) argues on review that the policy of workers compensation insurance it provided respondent did not cover injuries respondent's employees suffered outside the state of Virginia and accordingly, the Administrative Law Judge (ALJ) erred in assessing liability against Royal. Royal further argues the ALJ erred in the determination of claimant's average weekly wage by incorrectly determining the weekly value of money provided claimant for lodging and per diem.

The respondent argues it had a workers compensation insurance policy with Royal on the date of claimant's accident and the ALJ's finding that Royal was estopped from denying liability for this claim should be affirmed.

The claimant argues that the percentage of functional impairment should be increased and the remainder of the ALJ's findings should be affirmed.

The Workers Compensation Fund (Fund) did not file a brief with the Board but at oral argument before the Board, the Fund noted it was uncontroverted that respondent is now insolvent.

FINDINGS OF FACT

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award contains a detailed and accurate recitation of the facts regarding the claimant's work-related accident and resultant treatment. It would serve no useful purpose to iterate those factual findings and they are adopted and incorporated herein to the extent that they are not inconsistent with the findings and conclusions expressed herein.

The ALJ awarded benefits based upon a 16 percent permanent partial impairment of function to the claimant's left leg. The record contained the opinions of Drs. Pedro A. Murati and Kenneth A. Jansson concerning the percentage of claimant's permanent functional impairment to the left leg. Dr. Murati opined claimant suffered a 27 percent impairment of function and Dr. Jansson concluded claimant suffered a 5 percent impairment of function to the left leg. The ALJ concluded equal weight would be accorded the doctors' opinions and determined claimant suffered a 16 percent permanent partial impairment of function to the left leg.

On review, claimant argues Dr. Jansson's opinion should be discounted because it was not based upon the AMA *Guides*[1]. The record does not support claimant's contention. Dr. Jansson testified that he based his 5 percent rating upon claimant's continued subjective complaints of pain which is allowed by the AMA *Guides*. The Board adopts the ALJ's finding that based upon the facts of this case it is appropriate to accord equal weight to both doctors' opinions and, accordingly, affirms the ALJ's finding claimant suffered a 16 percent impairment of function to the left leg.

Royal argues that the ALJ incorrectly calculated the weekly additional compensation the claimant received. Royal agrees with the ALJ's determination of claimant's base gross average weekly wage of $258.46. The average gross weekly wage for an employee paid monthly is determined by multiplying the monthly payment rate by 12 and dividing that sum by 52.[2] (1,120 x 12 = 13,440 ÷ 52 = 258.46) There is no dispute claimant's base average gross weekly wage was correctly determined to be $258.46.

The claimant would work two weeks and then would be off work for two weeks. He was paid a monthly salary of $1,120. In addition, claimant received per diem of $6 per day for the two weeks he worked. Lastly, claimant was given approximately $600 to pay for his lodging while traveling. Claimant was required to keep receipts for his lodging expenses and would return the difference if the lodging expenses were less than the cash advanced for that expense.

The ALJ determined that the $6 a day per diem would result in additional compensation to the claimant of $42 a week. The ALJ also determined the $600 claimant received for lodging for his two weeks traveling on the job resulted in additional compensation of $300 a week. The ALJ concluded claimant's gross average weekly wage was $600.46.

The calculation of claimant's average gross weekly wage, under certain circumstances, may also include additional compensation the respondent provided claimant.[3] During the two weeks claimant was traveling to perform his job duties for the respondent he was paid a per diem of $6 a day. The ALJ determined that would calculate to $42 a week in additional compensation. Because claimant only worked two weeks a month, the Board concludes the ALJ correctly determined the $42 a week in additional compensation.

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[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[2] K.S.A. 44-511(b)(2).

[3] K.S.A. 44-511(a)(1)(2).

The ALJ concluded claimant also received additional compensation of $300 a week for lodging. The Board disagrees with this portion of the ALJ's analysis of claimant's average gross weekly wage.

In the determination of what is included as additional compensation, K.S.A. 44-511(a)(2)(C) provides:

> [B]oard and lodging when furnished by the employer as part of the wages, which shall be valued at a maximum of $25 per week for board and lodging combined, unless the value has been fixed otherwise by the employer and employee prior to the date of the accident, or unless a higher weekly value is proved; . . .

However, not every payment made to an employee by an employer constitutes "wages" for purposes of computation of average weekly wage. The computation does include those payments for work performed to the extent it results in economic gain to the employee.[4] Based upon this analysis, payments to reimburse claimant for business related lodging while engaged in business travel are not included in the average gross weekly wage computation. The reimbursement for these expenses is dollar for dollar and does not result in economic gain to claimant.

The cash advances for payment directly to the motel as reimbursement for lodging while claimant was traveling out of town to perform his job duties was not an economic benefit to the claimant and accordingly its value would not be included as additional compensation in the determination of claimant's average gross weekly wage. The Board concludes under the circumstances in this case the $600 cash advance claimant received for lodging was not appropriately included in the computation of the claimant's average weekly wage. The ALJ's determination of claimant's average gross weekly wage is modified to reflect an average gross weekly wage of $300.46.[5]

If the Kansas Workers Compensation Act (Act) applies, which it does in this case, the employer is liable to pay compensation to the employee.[6] The employer is required to secure the payment of compensation to its employees by either insuring the payment through an insurance carrier, or by qualifying as a self-insured or by securing a membership in a qualified group-funded workers compensation pool.[7]

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[4] *Ridgway v. Board of Ford County Comm'rs*, 12 Kan. App. 2d 441, 748 P.2d 891 (1987), *rev. denied* 242 Kan. 903 (1988).

[5] Claimant's submission letter to the ALJ noted claimant was not requesting the $600 advanced for lodging be considered part of the average gross weekly wage because claimant was required to reimburse respondent for the difference left from the actual receipts.

[6] *See* K.S.A. 44-501(a).

[7] *See* K.S.A. 44-532(b).

But if the employer has no insurance to secure the payment of compensation, and the employer is financially unable to pay the compensation, the injured worker may apply to the director for the compensation benefits to be paid by the workers compensation fund.[8] And it is not the claimant's burden to prove the employer is uninsured or otherwise unable to pay the owed compensation benefits.[9]

In this case a dispute arose whether respondent had workers compensation insurance coverage. The claimant impleaded the Fund pursuant to K.S.A. 44-532a alleging respondent was uninsured and financially unable to pay workers compensation benefits. At oral argument before the Board, respondent's counsel noted the respondent was now insolvent. The Fund's counsel agreed it was uncontroverted respondent was insolvent. Accordingly, if the Board determines respondent was uninsured, the Fund would be liable for benefits awarded in this claim.

It is undisputed respondent changed from a sole proprietorship to a corporation in 1994. At that time respondent requested that its insurance agent procure a workers compensation insurance policy to cover respondent's employees. The agent was required to obtain the workers compensation policy through the assigned risk pool of Virginia administered by the National Council on Compensation Insurance (NCCI).

The application for insurance indicated respondent had employees who traveled from Virginia into 13 other states.[10] NCCI placed the coverage with Royal and sent respondent a binder which specifically indicated: "Coverage is provided under the Workers Compensation Law of Virginia and of such additional states as may be requested, if such coverages are agreed to by the insurance company and are in accordance with the Plan rules." NCCI sent a letter to respondent's insurance agent which noted the application listed a lot of states but coverage was only for Virginia.[11]

The information page accompanying the policy that Royal sent respondent provided that workers compensation coverage was applicable to the law of the state of Virginia.[12] The information page further provided that coverage for other states was excluded.

The ALJ noted that respondent had paid premiums pursuant to this policy and Royal had audited claimant's business which should have revealed claimant's employees worked

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[8] *See* K.S.A. 44-532a(a).

[9] *See Helms v. Pendergast*, 21 Kan. App. 2d 303, Syl. ¶ 5, 899 P.2d 501 (1995).

[10] Kansas was not a listed state.

[11] Dotson Depo. at Ex. 4.

[12] Dotson Depo. at Ex. 3.

in many different states. Moreover, Royal had in the past paid claims for respondent's employees injured in states other than Virginia. Accordingly, the ALJ concluded Royal could not deny coverage in this claim. The ALJ did not mention the terms of the insurance policy which limited coverage to the state of Virginia and excluded coverage for other states.

It is well established that insurance is a matter of contract, and, as such, courts will enforce an insurance policy as written so long as its terms are certain and do not conflict with pertinent statutes or with public policy.[13] An insurance policy should be construed according to the sense and meaning of the terms used, and if the language is clear and unambiguous, it must be taken in its plain, ordinary and popular sense. When the insurance contract is not ambiguous, the court may not make another contract for the parties, instead its function is to enforce the contract as made.[14]

The plain and unambiguous terms of the binder and information page of the policy clearly limited coverage to Virginia and specifically excluded coverage for other states.[15] Applying the foregoing rules to construe the terms of the insurance contract, the Board concludes that the plain terms of the contract excluded coverage in other states and limited Royal's liability to provide coverage to respondent's employees in the state of Virginia.

Respondent argues Royal should be estopped from denying coverage because it had previously provided benefits for respondent's employees injured in states other than Virginia. Although that argument may be compelling, the rule in Kansas is that the equitable relief of estoppel cannot be used to expand coverage of an insurance policy.[16] In this case there was never a contract to provide coverage outside of the state of Virginia and to grant the equitable relief of estoppel claimed by respondent would operate to expand the plain scope of the insurance contract between Royal and respondent. The Board concludes respondent was uninsured for workers compensation in the state of Kansas on the date of claimant's accident. Accordingly, the Board modifies the ALJ's determination that Royal was liable for benefits on this claim and orders the benefits be assessed against the Fund pursuant to counsel's comments at oral argument stipulating the respondent was insolvent.

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[13] *Penalosa Co-op Exchange v. Farmland Mut. Ins. Co.*, 14 Kan. App. 2d 321, 789 P.2d 1196, *rev.denied* 246 Kan. 768 (1990).

[14] *Mah v. United States Fire Ins. Co.*, 218 Kan. 583, 545 P.2d 366 (1976).

[15] The insurance policy was introduced at the preliminary hearing but the parties stipulated at the Continuation of Regular Hearing that although the preliminary hearing testimony could be considered the exhibits offered at that hearing were excluded from consideration.

[16] *Western Food Prod. Co. v. United States Fire Ins. Co.*, 10 Kan. App. 2d 375, 699 P.2d 579 (1985).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated June 14, 2001, is modified to reflect the award of compensation is against the Fund and the claimant's average gross weekly wage is $300.46.

Robert Carpenter is granted compensation from the Fund for an April 22, 1997 accident and resulting disability. Based upon an average weekly wage of $300.46, Mr. Carpenter is entitled to receive 33.29 weeks of temporary total disability benefits at $200.32 per week, or $6,668.65, followed by 26.68 weeks of benefits at $200.32 per week, or $5,344.54, for a 16 percent permanent partial scheduled disability to the left leg, making a total award of $12,013.19, which is all due and owing less any amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of January 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
Kendall Cunningham Attorney for Respondent
William Townsley, Attorney for Insurance Carriers
Susan Ellis, Attorney for Workers' Compensation Fund
John D. Clark, Administrative Law Judge
Director, Division of Workers Compensation